

Regulating the Digital Economy in Kenya using Competition Law: A Focus on Abuse of Dominance

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This study looks at Kenya's competition law as a regulatory tool for the country's digital economy. It aims to show the applicability of the law in that context and make recommendations for its application in the face of a rapidly evolving technological environment. The study seeks to answer two questions regarding how competition law in Kenya has contributed to regulation of Kenya's digital economy and how it can foster regulation of the digital economy. To do so, the study begins by noting the current and projected contribution of Kenya's digital economy to its economic landscape. It then considers legal issues in a digital economy that can be dealt with using competition law. The study looks at the current legal position in Kenya regarding the use of those principles and their actual and potential application to emerging digital environments. This is intended to provide policy proposals that can support growth in Kenya's digital economy through a legal landscape that fosters competition and consumer welfare. In doing so, it contributes to literature on the application of Kenya's law to the country's digital economy.

Introduction

The digital economy is said to consist of economic activities that arise from connecting individuals, businesses, devices, data and operations through digital technology.¹ E-commerce transactions and online banking are examples of these activities.² Advantages offered by the digital economy include faster transactions and increased opportunities for business growth. Cybersecurity concerns and loss of employment are disadvantages that may emerge from these advancements in conducting business – related activities.³ These drawbacks can be addressed in various ways. Among these measures is regulation by law. In Kenya and elsewhere, the digital economy provides opportunities for income generation and convenient access to products by consumers. It is estimated that Kenya’s digital economy will contribute 662 billion Kenya Shillings to the country’s Gross Domestic Product by 2028.⁴

Competition refers to rivalry among businesses that sell products.⁵ It can spur efficiency, innovation, and customer focus, all of which can benefit consumers.⁶ Ideally, a competitive market should enable consumers to buy more and better products at lower prices.⁷ The role of competition policy is to prevent incumbent firms from hindering others from entering into or growing in a market.⁸ Ultimately, therefore, consumers and producers in a market can gain benefits from a competitive market.

Competition law is relevant to regulation of the digital economy because of some of the legal issues that pertain to that economy. Some of these issues stem from abuse of dominance⁹ by service providers in the digital economy. Service providers in this context include companies that provide

¹ Javaid, M., Haleem, A., Singh, R., Sinha, A. ‘Digital economy to improve the culture of industry 4.0: A study on features, implementation and challenges’ *Green Technologies and Sustainability* 2 (2024) 1. (Javaid et al).

² Javaid et al at 5.

³ Javaid et al at 5.

⁴ Available at <https://www.gsma.com/newsroom/press-release/kenyas-digital-economy-to-contribute-ksh-662-billion-to-gdp-by-2028-driven-by-policy-reforms/>. Accessed on 25 April 2026.

⁵ United Nations Digital Capital Fund ‘The role of competition in the digital economy’ *UNDCF Policy Accelerator* (2023) (UNDCF) 3.

⁶ UNDCF at 3.

⁷ UNDCF at 3.

⁸ UNDCF at 4.

⁹ Organisation for Economic Co-operation and Development, ‘Abuse of Dominance in Digital Markets – Contribution from Kenya,’ (2020) (OECD) 2.

access to the internet, social media platforms and financial services that enable payment for goods and services. The legal issues addressed in this paper relate to protection of consumers who use the products offered by companies through the internet.

It is against this background that this study seeks to answer the following research questions:

1. How has competition law in Kenya contributed to the regulation of the digital economy?
2. How can the above law contribute to regulation of Kenya's digital economy?

This paper considers the regulation of Kenya's digital economy through the lens of abuse of dominance by players in the digital economy. The first section of the paper looks at Kenya's competition law framework, application of the law in a digital economy context and its applicability in the same context. Thereafter, the paper answers the research questions and offers recommendations.

Kenya's Competition Law and its Application in the Country's Digital Economy

Protection of the health, safety and economic interests of consumers under Kenya's Constitution, 2010¹⁰ can arguably be enhanced by competition in markets for goods and services in Kenya. This position is supported by the preamble to Kenya's Competition Act (Chapter 504 of the Laws of Kenya)¹¹ which also prohibits abuse of a dominant position under section 25. A dominant position under the said Act is dependent on the market power that it holds.¹² Market power is defined by the Act to mean a firm's power to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers.¹³ It is also defined by the Act as a lack of numerous, independently acting sellers and buyers in a market.¹⁴

The Act uses market share as a parameter to gauge whether a business is dominant. It provides for a threshold of forty per cent control of market share as an indication of dominance unless the

¹⁰ Under article 46(1)(c).

¹¹ The preamble states that among the Act's objectives is to protect consumers from unfair and misleading market conduct.

¹² Section 23 of the Act.

¹³ Section 2 of the Act.

¹⁴ Nagy, C. 'The purpose of competition law and the structure of competition analysis,' in *The Conceptual Structure of EU Competition Law* (2024) 8.

business can show that it does not have market power.¹⁵ Even less than forty per cent market share can fulfill the dominance requirement by a business under the Act if it has market power.¹⁶

Dominance may be entrenched by significant regulatory, financial or other obstacles that hinder potential competitors from access to a market.¹⁷ Digital platforms' market power can be evaluated using criteria such as access to data and control of data that can confer market power.¹⁸ A study conducted in 2024 found that although online food and grocery delivery platforms did not have market power over retailers in the Kenyan market, there was potential for coordinated conduct among the relatively small number of platforms operating in the market.¹⁹ The study also found that customer complaints were in some instances handled by platforms' headquarters domiciled outside Kenya.²⁰ This raises questions about compliance with Kenya's Data Protection Act regarding transfer of data outside Kenya.²¹ Additionally, choice of law issues are particularly relevant when data is processed in multiple jurisdictions.²²

Globally, digital markets have become increasingly concentrated and this has resulted in a small number of firms controlling an expanding share of global market activity.²³ The emergence of generative artificial intelligence (AI) is likely to accelerate dominance by the firms.²⁴

The Competition (Amendment) Bill, 2024 sought to prohibit abuse of superior bargaining position and thus introduce a new prohibited practice to Kenya's competition law landscape.²⁵ In doing so, the Bill's aim was to control abuse of a dominant market position by digital platforms that wield relative market power over their competitors without having to prove dominance by digital market

¹⁵ Section 23(2) (a).

¹⁶ Section 23(2) (b).

¹⁷ UNDCF at 6.

¹⁸ Competition Authority of Kenya 'Online Food and Groceries Delivery Platforms Market Study – 2024' (CAK 2024) 16.

¹⁹ CAK 2024 at 60.

²⁰ CAK 2024 at 61.

²¹ Section 25(h) of the Data Protection Act.

²² United Nations Commission on International Trade Law 'Taxonomy of legal issues related to the digital economy' (2023) 33.

²³ United Nations Conference on Trade and Development 'Highly Concentrated Digital Markets Put Consumers at Risk. Here's how to change course.' Available at <https://unctad.org/news/highly-concentrated-digital-markets-put-consumers-risk-heres-how-change-course>. Accessed on 30 April 2026. (UNCTAD 1).

²⁴ UNCTAD 1.

²⁵ Akech, M., 'The Competition Amendment Bill 2024' (2025) Kenya ICT Action Network 21. (Akech).

platforms.²⁶ Proving dominance by the platforms can be hindered by difficulty in defining the relative markets in which they operate and difficulty in assessing their lasting market power.²⁷ The Competition (Amendment) Bill 2026 makes a second attempt to prohibit abuse of a superior bargaining position by re-introducing the provision contained in the Competition (Amendment) Bill, 2024.

Section 56 of the Competition Act can be applied in protecting consumer welfare in the context of products that can be bought from digital platforms. The section provides that engaging in unconscionable conduct in connection with the supply or possible supply of goods or services is an offence.

Conclusion

The Competition Act's provisions regarding a determination as to whether a business is dominant may be difficult to apply given the aforementioned difficulty in establishing whether a digital platform is dominant.²⁸ Consumer welfare protection is however possible using section 56 of the Act.

The potential amendment of the Competition Act through the Competition (Amendment) Bill, 2026 to prohibit a superior bargaining position provides leeway for further regulation of digital platforms in Kenya through competition law.

Recommendations

Continuous monitoring of the online food and grocery market by the Competition Authority of Kenya (CAK) for anticompetitive conduct has been recommended by a previous study.²⁹ This study recommends regular monitoring of digital platforms in various sectors of Kenya's economy for anticompetitive conduct by the CAK. This may, in addition to unearthing anticompetitive conduct, deter platforms from engaging in the conduct.

²⁶ Akech at 21.

²⁷ Li, Q., Cauffmann, C., 'Abuse of Relative Dominance by Digital Platforms: A Law and Economics Perspective' GRUR International (2025) 217. (Li, Q., Cauffmann, C.).

²⁸ Li, Q., Cauffmann, C. at 17.

²⁹ CAK 2024 at 61.

Further, scheduled co-operation programmes by regulatory agencies such as the CAK and the Office of the Data Protection Commissioner may bolster a previous study's proposal for the CAK to collaborate with relevant regulators for more effective control of anticompetitive activities by digital platforms in Kenya.³⁰

³⁰ CAK 2024 at 61 to 62.